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# Wrestling with Rights:

## Judges, Parliament and the Making of Social Policy

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# Editors' Note



In public debate about the impact of the Charter of Rights on Canadian political life, discussion tends to revolve around the role of the courts. How has the judiciary interpreted its mandate under the Charter? Are judges engaging in policy making? If so, should they be reined in?

In all of this, the impact of the Charter on the other branches of government tends to be an afterthought: if the power of the courts has increased, the power of the executive and legislative branches must have decreased. Relatively little attention is given to the Charter's more subtle effects on the behaviour of politicians and policy makers.

Janet Hiebert's paper in the IRPP's *Courts and Legislatures* series takes up this neglected theme. Professor Hiebert examines how the Charter has affected policy making, tracing three federal legislative initiatives where rights considerations have played an important role. The federal government, she finds, has not been a passive player, allowing the courts to dictate Charter obligations unopposed. Instead, it has established mechanisms within the federal bureaucracy to assess the rights implications of policy, and has, with varying degrees of fortitude, reacted to judicial nullifications of legislation with alternative readings of Charter provisions. In short, the Charter has penetrated policy making circles and altered how governments think and act.

This analysis leads Professor Hiebert to a conclusion that is both practical and constructive. If our elected representatives are Charter-sensitive, then it would be reasonable to give them a greater voice in Charter interpretation. To that end, she proposes the establishment of a parliamentary committee that would review proposed legislation to assess its compatibility with the Charter of Rights and thereby initiate Charter "conversations" with the courts.

The idea that courts and legislatures should engage in a dialogue for the purpose of jointly determining the rights implications of policy is a popular one these days. Some think such conversation already takes place, as Peter Hogg and Allison Thornton argue in the April 1999 issue of IRPP's *Policy Options*. Others, like Ted Morton in the same issue of the magazine, contend that it is a one-sided discussion dominated by the courts. Professor Hiebert takes a stand somewhere between the two, finding some evidence of fruitful conversation, but pushing for institutional change that would allow legislatures to articulate their viewpoint more forcefully.

The idea of establishing a parliamentary Charter committee is worth considering, for both sides in the debate over judicial power might take something from such reform. Many critics of the courts, unhappy with the performance of our judiciary, would undoubtedly applaud any move to give legislatures a greater voice in Charter interpretation. But Charterphiles, for their part, might look upon the measure as a way of deepening and broadening Charter attachment by bringing rights discourse to public forums more closely connected to the Canadian public than the courts. If the power of the judicial branch in the Charter era has created a rift in the Canadian polity, constructive proposals to help bridge the gap should be given a serious look.

## Introduction

When the Canadian Charter of Rights and Freedoms became part of the Canadian legal and political landscape in 1982 it changed fundamentally the role and responsibilities of Canadian courts. With the scope of their constitutional judicial role no longer confined to arbitrating jurisdictional conflicts between two orders of government, judges have seen a fundamental change in their responsibilities. This change has signalled an end to the historic reluctance to enter into a sphere previously considered explicitly political and, as such, the exclusive prerogative of Parliament. Although the constitution gives courts little choice but to review state actions for their consistency with protected rights, the judiciary has demonstrated little inclination to minimize the policy implications of this task by either interpreting rights narrowly or declining judicial leave to review issues involving political or moral questions. Since the Charter's introduction, the judiciary has passed judgement on the constitutionality of a breathtakingly broad range of political and social issues from the testing of cruise missiles in Canadian airspace to euthanasia.

Most observers assume that the principal effect of the Charter is on courts. But what should not be overlooked is how a judicially reviewable bill of rights affects governing. Governments at all levels are constrained in their ability to pursue legislative priorities, even where legislation is considered to represent a compelling public interest. These constraints do not arise solely from judicial rulings. Other factors are: interest groups, who raise Charter concerns when trying to influence legislative decisions; government lawyers, who play a pivotal role in analyzing policy and evaluating whether government bills are consistent with the Charter; and political concerns about the social and economic consequences of having legislation invalidated by courts. In short, the Charter has changed the political environment and climate of legislating and is influencing legislative choices at all stages of the policy process.

How the Charter affects governing is the subject of this paper. The paper has seven components. The first section discusses expectations in the literature about how representative institutions might respond to the Charter, particularly in situations where rights issues arise. Section two, "Internal Scrutiny of Proposed Legislation," examines the federal government's internal processes for evaluating legislation from a Charter perspective. Sections three to five analyze the Charter's effects on legislative decision making in three policy areas: restrictions on the advertising of tobacco products, the rules for the conduct of sexual assault trials and access to victims' private records in sexual assault cases. All three policies reveal important insights into how Parliament views its responsibilities to interpret the Charter and how it has chosen to respond to judicial rulings that reflect a different interpretation of rights as they apply to complex social conflicts. Section six, "Assessing Political Responses to Charter Conflicts," revisits the issue of how representative institutions are responding to the Charter and comments on tensions that arise between the judiciary and Parliament. The final section recommends a process to augment Parliament's role and effectiveness in evaluating legislation in light of Charter considerations.

## The Charter's Effect on Legislative Decision Making

How the Charter affects political decision making is significant for a number of reasons. First, legislation often represents a final and authoritative decision about how to balance rights, values, interests and other policy perspectives. Despite the constraints

imposed on Parliament by judicial decisions, for many issues Parliament retains a hegemonic position to define the scope and parameters of legislation. Thus, the extent to which public and political officials internalize Charter values (as measured by, for example, the influence of rights on how policy is conceptualized and formulated) is a vital indicator of the Charter's effects on governing.

Second, the Charter may diminish political resolve to define pressing social problems and exercise judgement about how best to reconcile these with constitutional standards. The desire to avoid difficult decisions, by waiting for courts to resolve them, may be tempting. Analysis of how Parliament and government are interpreting legislative priorities within the constitutional framework shaped by the Charter will shed light on how the Charter is affecting political responsibility.

Third, a deeper understanding of the Charter's effect on political decision making may alter public perceptions of the proper roles and prerogatives of the different institutions of governance. The criteria against which legislation is assessed are both open-ended and subject to philosophical disagreements. Disagreements between judicial and elected officials on how best to resolve rights conflicts lead some to question whether judicial opinions should always determine the relative priority of conflicting rights and values. The Canadian Constitution anticipates conflicts between courts and Parliament and provides a mechanism for resolving these: the legislative override (notwithstanding clause) in section 33. This controversial clause allows Parliament to set aside a judicial finding under the Charter, with some important exceptions.[1] Yet public and political opinion is unsettled about whether the use of the override is appropriate and, if so, under what circumstances. This scepticism may be well-founded if Parliament does not pay due regard to the values of the Charter when developing legislation. If, however, legislative decisions are based on careful and sensitive consideration of how best to balance conflicting rights and values, and these decisions are, nevertheless, invalidated by the judiciary, the override might have greater acceptance.

### *Theoretical Debates about the Charter's Likely Influence*

Two divergent views have emerged about the Charter's likely influence on political will to pursue policies that attract rights-based criticism. One view, which is pessimistic about the purported advantages of a Charter, considers the Charter as offering a convenient refuge for politicians to avoid or delay difficult political and moral decisions.[2] Elected representatives can insulate themselves from criticism, and political parties can avoid risking party cohesion, by ignoring controversial issues and claiming that fundamental issues of rights should first be resolved by courts before political decisions are taken. Conflicts involving rights are treated as legal questions rather than political ones with the concomitant assumption that judges, instead of elected representatives, should resolve them. Thus, the expectation is for political inaction in which Parliament not only avoids issues but does not exert influence on how the Charter should be interpreted and applied to social conflicts.

If this assessment were accurate, it would mean that there has been an abrogation of political responsibility to make policy decisions in the public interest. Reasonable people may have different views on how to resolve competing claims around rights and of the proper uses of state power in their resolution. This is because many social conflicts are political in the sense that they invoke differing philosophical assumptions about which values are important, what priorities should be attached to conflicting rights, and what the role of the state should be in defining and responding to pressing social and cultural concerns. This likelihood of philosophical differences in resolving contentious issues suggests why answers to rights conflicts

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should not be assumed to be uniquely and intrinsically legal, and why a political regime should not vest exclusive authority in courts for reconciling them. As Peter Russell suggests, this abrogation of political responsibility weakens the fabric of democratic decision making:

> [W]e should not lose sight of the possibility that excessive reliance on litigation and the judicial process for settling contentious policy issues can weaken the sinews of our democracy. The danger here is not so much that non-elected judges will impose their will on a democratic majority, but that questions of social and political justice will be transformed into technical legal questions and the great bulk of the citizenry who are not judges and lawyers will abdicate their responsibility for working out reasonable and mutually acceptable resolutions of the issues which divide them.[3]

A more optimistic view of how judicial review will affect parliamentary responsibilities suggests that Parliament will not be treated or consider itself as an inferior partner in constitutional interpretations. Instead, Parliament will become part of a dialogue on how the Charter should be interpreted. This dialogue model suggests that the Charter need not frustrate legislative agendas. The Supreme Court rarely rules that a legislative objective itself is inconsistent with the Charter and therefore cannot be pursued. Instead, judicial concerns tend to focus on the reasonableness of how legislative objectives are implemented. This provides Parliament the opportunity, which it frequently takes, to revise legislation to respond to judicial concerns. Thus, Parliament is not impeded from pursuing its legislative initiatives; it simply has to give more sensitivity and thought to how it proposes to accomplish them. This view, then, suggests that the Charter will facilitate healthy dialogue about "how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole."[4]

Elsewhere, I have expressed an optimistic view of the Charter's potential to facilitate conversation between Parliament and courts, with reservations. Parliament can incur difficulty when attempting to introduce legislative measures that are similar to those which have been struck down as unconstitutional. Not all policies are necessarily suitable to "fine tuning" because it may not always be possible to identify alternative policy means that will be effective and practical and, at the same time, impose a less intrusive infringement on a protected right.[5] Furthermore, the political costs of introducing legislation similar to that struck down cannot be discounted. Supreme Court decisions attract strong allies who find in these judgements powerful ammunition in the actual words of the countries' highest judges. Not only do these judgements provide the pretext for critics of legislative initiatives to engage in armchair judging, but their opposition to legislative initiatives is expressed in the moral language of rights. It makes little difference whether the Court has ruled that previous legislation is only faulty in part, that the legislative means, as opposed to objective, are problematic. The very fact that the Court has ruled that legislation violates the Charter provides critics strong rhetorical force when opposing similar, albeit revised, legislative initiatives. Moreover, the nature of the rights infringement seems to matter little in the willingness of critics to use the language of rights to claim moral and legal primacy for their view.

Thus, the dialogue model may not always capture the relationship between courts and Parliament. As will be discussed in section three, for example, the tobacco example only appears at first blush to demonstrate how the Charter is working to facilitate dialogue to improve the quality of legislation by making it more sensitive to considerations of rights. It will be argued that in fact the Charter's influence was not this benign. The 'right' at issue in this case was not only peripheral to the kind of fundamental values that underlie a bill of

rights but the judicial suggestion about how to improve the legislation was related to technical or plumbing matters about which the Court had little expertise. Nevertheless this suggestion served as a significant constraint on legislative options and led to less comprehensive legislation than had originally been enacted.

At the same time, the government's treatment of the tobacco case is difficult to characterize as inaction because of its willingness to pursue legislation that would almost certainly lead to a Charter challenge. Yet this too must be qualified. Despite its commitment to the goal of discouraging tobacco consumption, the government was not willing to pursue more comprehensive and effective measures because of fear that these would be invalidated. Some might view this as government immobility and a reneging on political responsibility to pursue the public interest.

Other cases offer evidence of a more assertive government response. As discussed in sections four and five, Parliament saw itself as an important contributor in a dialogue about the rules of consent and access to victims' private records in sexual assault trials. In these cases, Parliament consciously attempted to change the legal paradigm in which conflicting rights are assessed. Thus, neither view fully captures how the Charter is affecting the policy process: if the government has sometimes accepted a secondary role in Charter interpretation, at other times it has fought hard to be recognized as an equal partner in a Charter dialogue with the judiciary.

## Internal Scrutiny of Proposed Legislation

Before turning to these examples of the political reaction to adverse court rulings, there is an earlier stage of the policy-making process to consider: the internal scrutiny of proposed legislation by Justice officials and Cabinet. An impetus for the government to assess the Charter implications of proposed legislation before its introduction to Parliament is the requirement that the Justice Minister certify that government bills have been assessed in light of the Charter and when inconsistent with its purposes and provisions, report this fact to Parliament.[6] To date, no report has been made. As will be argued below, this is not explained by a disregard for the Charter but rather by the development of a bureaucratic and political culture which frowns upon introducing legislation that would require such a report.

The nature of this internal process of Charter analysis, and its effects on policy decisions, are difficult to assess. Those in the Department of Justice whose job it is to identify Charter concerns and give advice are reluctant to speak frankly about the specific policies which raise Charter difficulties, the exact nature of the advice given, and the response of other departments and political officials to that advice. The secretive nature of this exercise is protected by confidentiality requirements of lawyers working within the Department of Justice to those receiving their advice (referred to as their clients), by a lack of public access to the relevant paper trails and by cabinet secrecy.

Despite the secretive nature of this process, interviews with a number of former and current Justice lawyers who are willing to speak generally and anonymously, occasional policy statements or background papers released by the Department, and testimony of Justice lawyers who appear before parliamentary committees, allow for the following observations and assessment of the process.

### *Evaluating Bills in the Department of Justice*

The Charter has increased the influence of the Department of Justice in shaping legislation. The Department established the Human Rights Law Section in 1982 to review existing legislation for the

purposes of identifying Charter conflicts and bringing statutes into conformity with the Charter[7] and to provide ongoing advice on Charter issues. The latter task involves analyzing the legal implications of policy proposals and systematically assessing whether government bills comply with the Charter.

The Department has responsibility for drafting all government bills. However, before this takes place the sponsoring Minister must submit to Cabinet a memorandum setting forth the objectives and implications of the proposal, including any Charter concerns. The awareness that Charter difficulties will be noted, along with their implications for the viability of the policy in terms of judicial review, places pressure on departments to work with Justice officials to address Charter concerns before the memorandum is submitted.

Justice lawyers are acutely conscious of the need to distinguish legal advice on the Charter from policy advice; it is recognized that the responsibility for allocating priorities in social policy conflicts remains political in nature. From their perspective, if legal opinion is replaced by policy advice about whether a proposed course of action has merit, Justice lawyers will have overstepped their responsibility and undermined their credibility to provide legal advice on Charter issues. Yet this distinction between advice and opinion can become blurred because Charter advice may be inextricably connected to evaluating the justification of legislation. For example, to conclude that a bill imposes a restriction on a right that is not reasonable, and therefore may not survive the Charter, can be interpreted as another way of saying that the bill is not justified because its objectives are not important enough to warrant such a grave restriction on protected rights.

With this delicate balance in mind, of the need to distinguish legal advice from policy opinion, the Department has adopted an approach for reviewing bills based on a risk assessment of the degree of difficulty for justifying legislation under the Charter. Risk assessments are undertaken on a continuum from minimal, significant, substantial, serious to unacceptable risks, the latter representing almost certainty that courts would invalidate the legislative action. At times, Justice officials have been asked to put their assessment into numerical terms: to evaluate, for example, whether legislation has a 60 percent chance of surviving as opposed to a lesser chance, or to indicate where the degree of risk is situated on a scale of 1-10. However, they are reluctant to offer advice in these quantitative terms; while it can be difficult to distinguish between significant, substantial or serious risks, assessments continue to be framed in qualitative terms.

The approach to the evaluation of bills has been greatly influenced by Supreme Court jurisprudence. The Charter's structure and, in particular its inclusion of a general limitation clause in section 1, has encouraged the Court to adopt a two-stage approach to judicial review: i) does the rights claim have constitutional protection and is it infringed and, if so, ii) is the restriction reasonable? The Charter states explicitly in section 1 that rights can be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." It is largely with reference to this second stage that risk assessments occur, particularly for those rights and freedoms which do not contain any internal reference to reasonableness.

The Human Rights section has sought to convince other departments to seek Charter advice as early as possible in the process of developing policy. Justice lawyers believe that when Charter assessments are done early it is easier to identify ways of accomplishing legislative objectives in a manner that is both more likely to survive a Charter challenge and to minimize disruption in attaining the policy goal. Another perceived advantage of thinking about Charter implications early in the policy process is to anticipate possible Charter challenges and consciously develop a legislative record for addressing judicial concerns. This record

may include research on policy objectives, consultations with interested groups, social science data, the experiences of other jurisdictions with similar legislative initiatives, and testimony before parliamentary committees by experts and interest groups. Another form of anticipating judicial review is the increased use of legislative preambles, stating the objectives and assumptions underlying the legislation, of which more will be said later.

This sensitivity to the Charter does not mean that policies are forsaken because they incur serious Charter risks. The threshold for accepting that a policy complies with the Charter, and therefore does not require a report to Parliament, is whether or not a credible Charter argument can be made. When less risky ways to accomplish policy objectives cannot be identified, Cabinet ultimately will be required to render a political judgement about whether to proceed. However, the context in which this judgement is made gives rise to obvious tension between the Justice Minister's statutory obligation to report to Parliament, if a bill is inconsistent with the Charter, and an emerging political culture that assumes that no report should be made. Thus, the prevailing assumption is that government should not pursue legislation that is considered to be so patently inconsistent with the Charter that it would require the Justice Minister to report to Parliament; before reaching this stage, the bill should be either amended or withdrawn. This political presumption against a report to Parliament creates strong incentives to find ways of pursuing legislative objectives in a manner that incurs lower Charter risks. It puts pressure on the Minister of Justice, who also serves as the Attorney General, to convince his or her colleagues of the need to amend policies so that a credible Charter argument can be made. If the government is intent on pursuing a course of action for which the Justice Minister concludes that no credible Charter argument can be made, the Minister will likely feel compelled to resign. To date, these conflicts have been resolved to the satisfaction of the Justice Minister, at least to the extent that no Minister has yet concluded that it is necessary to report to Parliament or resigned for this reason.

While the Minister has considerable influence in Cabinet, he or she must be prudent in deciding when and how this influence will be exercised. Other ministers will have a strong commitment to their departments' policies and may not be easily convinced about the need or value of modifying or withdrawing proposals. Consequently, the Minister of Justice must save these ultimate recourses, a warning of the need for a report to Parliament or the even stronger threat of resignation, for those rare circumstances when other forms of influence and pressure are not successful and where the Minister believes emphatically that a credible Charter argument cannot be made. Exactly how often these conflicts occur or how they are resolved are confidential; however, informed sources indicate that occasional "wing-ding" fights have occurred in the Cabinet room.

Some might understandably interpret the lack of reports to Parliament with scepticism about the influence and rigour of Charter advice and scrutiny.[8] Although the secretive and confidential nature of the process for evaluating proposed legislation makes it difficult to assess whether scepticism is appropriate or misplaced, a fuller explanation for the absence of reports to Parliament likely has the following three elements.

First, the Charter has helped to facilitate a political culture within the bureaucracy and government that is reluctant to be, or appear to be, indifferent or insensitive toward the Charter. One manifestation of this culture is the view that the integrity of the Charter, as a statement of fundamental constitutional values, would be undermined if the government purposively pursued a course of action considered by its own Justice Minister to be unreasonable under the Charter. From a pragmatic standpoint, legislation requiring a report to Parliament would be in an extremely pre-

carious position, vulnerable both to political embarrassment and successful Charter challenge. Opposition parties would have a field day criticizing the government for pursuing a course of action that its own Justice Minister believes to be patently unconstitutional. Furthermore, litigants would readily argue that the legislation should not be upheld because even the government recognizes that it violates the constitution in a manner that cannot be considered reasonable or justifiable. It is difficult to imagine that the Supreme Court would be prepared to uphold legislation as a justifiable infringement of the Charter, when the Justice Minister has admitted such profound inconsistency.

This political culture of not reporting has interesting implications for government if it wishes to pursue legislation that is clearly inconsistent with the Charter or leading Supreme Court precedents. It suggests that the only political option for introducing legislation that is patently inconsistent with Charter jurisprudence is to enact the legislative override. While the override overcomes the difficulty of courts overturning legislation, it is as susceptible to political difficulty as is a report to Parliament.

A second reason for the absence of reports is that the threshold for avoiding one is not mandated by the Justice Act but has evolved from practice. Ultimately, judgement about whether a credible Charter argument can be made has political and subjective elements and may vary depending on the philosophical views and interpretation of the Charter by the particular Justice Minister of the day. However, this threshold is broad enough that it is unlikely that many bills for which there is substantial Cabinet and political support cannot be subsumed under this criterion. The Charter itself, and how it has been interpreted, have contributed to the breadth of this threshold. Questions of what values are consistent with a free and democratic society, which is the normative framework for evaluating limits on rights, are not exclusively legal and will invoke differences of opinion amongst reasonable people.[9] The Supreme Court itself has declared that these are not universal standards but that the Charter's structure (its inclusion of limitation and override clauses) provides a unique context for evaluating the justification of legislative policies that differentiates assessments of reasonableness in Canada from other jurisdictions.[10] Furthermore, issues relating to a policy's reasonableness, evaluated against a changing and evolving jurisprudence around interpretations of proportionality criteria, are also subject to differences of opinion, both within the Supreme Court and amongst political and public officials.

A third reason for the lack of reports is the tension between the role the Justice Minister serves as Attorney General, and his or her partisan role as a member of Cabinet, which may be sufficient to dissuade the Minister from reporting to Parliament in very close calls which involve substantial Charter risk. The breadth of the threshold, and the real possibility that reasonable and tolerant people will differ in their conclusions about whether legislation is justified, may reinforce this reluctance.

In summary, the Charter's effects on how policies are assessed and analysed before they are introduced to Parliament may not be visible. However, its influence has been both systemic and systematic and has changed the political environment in which policies are conceptualized, drafted and defended in public debate. Bureaucratic scrutiny and the Justice Minister's obligation to report to Parliament ensure that the Charter receives significant consideration before legislation is put forward.

But this is only the first stage in the policy making process where the Charter has a marked impact. As discussed in the following three sections, when courts nullify legislation, Parliament must decide what response is appropriate. The responses chosen in the cases under examination offer further evidence of the way in which the government has tried to exercise some influence over Charter interpretation.

## The Charter's Effects on Legislative Response to Judicial Decisions: Restrictions on Tobacco Advertising and Sponsorship

In 1995 the Supreme Court in *RJR-MacDonald Inc.*[11] struck down legislation with the ambitious objective of discouraging tobacco consumption, particularly amongst impressionable and young people, by prohibiting the advertisement and promotion of tobacco products and by requiring that manufacturers of tobacco products display health warnings on packaging. The Court ruled that the legislation violates freedom of expression. The Court did not disapprove of the legislative objective but by a five to four majority ruled that the legislative means were not reasonable. Parliament subsequently enacted new legislation, in an attempt to respond to the Court's concerns, which itself is being challenged under the Charter by tobacco companies.

### *Supreme Court decision in RJR-MacDonald Inc.*

The majority decision, written by Justice McLachlin with Lamer CJ, Iacobucci, Sopinka and Major concurring, stated that no matter how important Parliament's objective may seem, if the government cannot demonstrate that the means by which its goal will be achieved are reasonable and proportionate to the infringement of rights, the law should fail.[12] The legislation was not rational because no causal connection, based on direct evidence, logic or reason, exists between the legislative objective of decreasing tobacco consumption and the legislative means of prohibiting tobacco trademarks on advertisements for other products.[13] The majority ruled that the Court should not accept the "mere intuition" of Parliament because the Charter's requirement that legislation be demonstrably justified and reasonable should be based on "rational inference from evidence or established truths."[14] The majority was also critical of the use in the legislation of a ban on all advertising and promotion, particularly in light of the government's failure to introduce evidence about the utility of less intrusive measures despite its knowing of relevant studies. This failure to introduce evidence to support its ban on advertising led to the majority's conjecture "that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result."[15]

As will be argued shortly, the majority's assessment of the legislation had a substantial influence on the subsequent legislative response. The majority speculated that a ban on lifestyle advertising would be an effective way of achieving the objective of deterring tobacco consumption and yet satisfy judicial concerns of minimal impairment. Although neither argument nor evidence were put forward to sustain this opinion, the majority, nevertheless, pronounced that as a matter of "common sense" lifestyle advertising will likely discourage those who might otherwise cease tobacco use from doing so. Thus, the message the majority sent to Parliament was that it could pass legislation restricting tobacco lifestyle advertising and be reasonably assured that this would pass judicial scrutiny in the future.

Both the majority's inferences about why the government had not introduced evidence to support the ban on advertising and the suggestion of an alternative choice of policy means provoked criticism from Justice La Forest, who wrote the dissenting opinion, with L'Heureux-Dubé, Gonthier and Cory concurring. The minority thought it unwise for judicial conjecture about the contents of documents unavailable to judges to "displace the overwhelming evidence that the prohibition was a reasonable one." Parliament has a reasonable basis, after 20 years of research and legislative experimentation, to believe that all tobacco advertising stimulates tobacco con-

sumption.[16] The minority characterized tobacco legislation as the archetypal case in which the Court should be prepared to give Parliament substantial latitude in choosing the legislative means it considers the most appropriate for addressing the social problem. It was critical of the majority's speculation that Parliament should have considered restrictions on lifestyle advertising, stating that it is not appropriate for the Court to substitute its own judgement for Parliament's, particularly on a matter for which the Court lacks expertise:

> [I]t would be highly artificial for this Court to decide, on a purely abstract basis, that a partial prohibition on advertising would be as effective as a full prohibition. In my view, this is precisely the type of "line drawing" that this Court has identified as being within the institutional competence of legislatures and not courts.[17]

### *Assessing the Judicial Decision*

Two aspects of the Court's approach to judicial review warrant comment because of their implications for how the Court evaluated Parliament's legislative initiative: 1) the exceedingly broad definition of freedom of expression and 2) the manner in which the Court assessed the reasonableness of how Parliament's initiative was translated into legislation. By elevating tobacco advertising to the level of constitutionally protected speech the Court has transformed a purely political issue, involving conflicting economic and political interests, into a constitutional debate over fundamental rights. Once it concluded that speech is violated, the Court was drawn into the middle of a complex and multifaceted policy debate.

Yet it can be argued that the conflict over tobacco advertising is not about rights at all. At issue is a policy disagreement between tobacco companies' economic interests to maximize profits and maintain market share and the government's objective to dissuade young and impressionable people from becoming smokers. Citizens may have different views on the logic or effectiveness of controlling tobacco advertising. However, democratic principles of representative government generally assume that these kinds of policy disagreements should be resolved in the representative branch of government. Apart from the necessity that courts arbitrate jurisdictional disagreements between different levels of government in federal states, political conflicts should only be subject to judicial review when state action has implications for fundamental rights. The Charter, like other bills of rights, was intended to protect citizens and other human members of the polity. Thus, the Court's elevation of a corporate economic interest to the same status as individuals' constitutional rights, and its protection of that interest, are ill-conceived.

In this case, the Court was not required by the Charter to extend protected speech to corporate activities. Instead, it could have adopted a more limited definition of speech by excluding trivial claims unrelated to the healthy functioning of a democratic polity, however broadly interpreted. Under this approach, the Court would have inquired whether and how tobacco advertising relates to the kinds of values the Court elsewhere has said underlie freedom of expression: (1) seeking and attaining the truth; (2) encouraging participation in social and political decision making; and (3) cultivating diversity in forms of individual self-fulfillment in a tolerant and welcoming environment for speakers and listeners.[18]

This decision in favour of such a broad definition of speech was discretionary, as opposed to being mandated by the Charter, and is now firmly entrenched in jurisprudence. In the Court's opinion, any activity that conveys or attempts to convey a meaning has expressive content and *prima facie* falls within the scope of the guarantee.[19]

The Court may not like the idea of relying on definitional limits for speech. Nevertheless, it is important to realize that the Court has in the past, and will in the future, rely to some degree on such limits. Before the Court ever addressed whether the Charter protects commercial expression, it did in

fact adopt definitional limits to exclude the right to strike from the scope of the Charter's protection for freedom of association.[20] It is difficult to appreciate how the Court can coherently rule that one form of economic activity (striking by labour unions) is beyond the Charter's protection, while another form (corporate advertising) is protected. Furthermore, the Court has indicated that it will exclude violent activities from the scope of the Charter's protection of speech.[21] This is logical because it would greatly trivialize the significance of constitutional rights were murder or physical violence to be treated as protected speech, subject only to reasonable limits.

But even accepting the decision to classify commercial advertising as protected speech, it can still be argued that the Court could have minimized the extent to which it was interfering with Parliament's choice of policy means. For example, it could have followed the minority's suggestion that substantial deference was owed to Parliament on the question of how best to tackle this ambitious and complex legislative objective. This would have been consistent with past rulings where the Court has warned against taking "a restrictive approach to social science evidence" that requires "legislatures to choose the least ambitious means to protect vulnerable groups."[22] It has also indicated that when the rights claim is peripheral to the values intended to be protected the standard for justifying limitations is lower. Thus, where a rights claim is only "tenuously connected to the values" underlying a protected right, restrictions on that right are easier to justify, as in the case of restrictions on hate literature.[23] In this vein, restrictions on commercial speech have been easier to justify than infringements on other rights.[24]

For those who do not desire judicial deference, comfort might be found in the majority's warning:

> To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.[25]

However, this statement would be more appropriate in another context: where, for example, the legislative infringement on speech undermines the robust and healthy functioning of a liberal democratic polity or restricts artistic and cultural expressions that reflect diverse and contrary views. The statement ignores the difference between the need for the Court to be vigilant when protecting fundamental rights as distinct from reviewing an economic policy disagreement where the language of rights has been invoked strategically, but inappropriately, to dress up a corporate policy interest that does not reflect any reasonable moral or normative claim on society. The value advanced by tobacco advertising is far removed from what is essential to preserve the constitutional foundations that the majority worries about. Its failure to distinguish between different kinds of speech, and the appropriate level of judicial scrutiny attendant on these, is shallow. Moreover, it risks trivializing the significance of constitutionally protected rights and undermines public acceptance of judicial intervention when fundamental rights are jeopardized by state actions.

It is important to emphasize the consequences of this judicial approach. Stated simply, the more broadly that courts interpret rights, the more often judges will be required to don the hat of the policy analyst and assess the reasonableness of the means chosen to pursue social policy. When the judiciary acts in this manner, it is engaging in policy analysis pure and simple. And yet judges lack a policy background and access to resources that allow for informed evaluations of complex policy options. No matter how eminent judges are, no matter how principled in interpreting the Charter, policy analysis is not where their training and expertise lie. In this case, an informed assessment of Parlia-

ment's chosen means to discourage tobacco consumption would require review of issues related to marketing strategies, behavioural research and health studies. Such issues are well beyond judges' area of expertise. They are of a nature for which legal training provides virtually no guidance but are peculiarly apposite to Parliament, with its access to the necessary resources and comparative knowledge to develop policy.

A related concern is the Court's method for assessing the reasonableness of the legislative means. The Court's speculative discussion of whether the legislation comports with judicially-created proportionality criteria demonstrates their ill fit to complex social problems. It is particularly difficult to measure the effects of tobacco advertising on consumption. To even suggest that this measurement is attainable suggests false confidence that society possesses the requisite knowledge and appropriate methodology to predict how to change human behaviour with regard to an addictive habit. Moreover, policy developers must anticipate the many ways in which tobacco companies will attempt to undermine this objective because of their fundamental and vested interest in encouraging tobacco consumption.

Thus, it is worrisome to see the strategies for pursuing this complex social policy evaluated against judicial interpretations of whether the means chosen were significantly more restrictive than some other hypothetical possibility. By structuring the conflict in this way, those who opposed the legislative initiative were at a distinct advantage. Inconclusive social science data and behavioural/health studies make it difficult to challenge, empirically, tobacco companies' twin claims: that less restrictive measures are required to satisfy reasonableness criteria and that because no clear causal linkage can be established between advertising and tobacco consumption, this must mean that restrictions on advertising are not rational.

Had the Court adopted a more precise definition of expression, or engaged in a more purposive or thoughtful discussion of what is important about free speech and what kinds of state actions impede it, the Court might never have ruled that the legislation conflicted with the Charter. It would also not have been placed in the position of having to review the fine-tuning of such a complex social policy. In short, the Court's decision, in this case, seems ill-founded.

In light of the marginal nature of the speech claim in this issue, and the difficulties inherent in judicial review of Parliament's choice of policy means, a forceful response from Parliament might have been anticipated. However, this was not to be the case.

### *Influence of Decision on Subsequent Legislation*

Less than a year after the Court's decision, the federal Liberal government introduced new legislation (Bill C-71) with similar purposes but using different legislative means.[26] What is significant about the new legislation was the centrality of the majority's emphasis on restricting lifestyle advertising. Then Health Minister David Dingwall made it clear that policy developers had moved "painstakingly" to examine the Supreme Court's decision "line by line" and sought two independent consultations to ensure that the new legislation would be constitutionally valid.[27] In developing the legislation, the department took guidance from the Court's decision by incorporating the majority's suggestion for a ban on lifestyle advertising.[28] A senior official with the Department of Health confirmed the influence of this dimension of the Court's ruling on the design of the legislation:

> We have taken those parameters and that is how we've crafted the bill, so that any promotion that appeals to youth or is associated with youth or has a lifestyle connotation is an area that is restricted. We feel we have taken a lot of care to reflect the guidance provided by the Supreme Court.[29]

It seems extraordinary that the judiciary's speculative comment would have such influence on the design of legislation that addresses a complex social problem that baffles the policy experts and can hardly be said to fall within the Court's competence. From a pragmatic perspective, it is understandable why the government would have been tempted by this suggestion, particularly with its attendant message that this would likely be considered a constitutionally valid way of discouraging tobacco consumption. The government would obviously be anxious to avoid suffering another judicial setback. Nevertheless, the prudence of framing this policy around the majority's "common sense" observation may be questionable. Disagreements expressed during parliamentary committee hearings about whether lifestyle advertising affects consumption suggest uncertainty about how effective this legislative strategy will be. They also raise doubts about whether the legislation will be immune from successful Charter challenge on the same grounds that were used to defeat the previous legislation.

Tobacco companies have focused much of their considerable criticism of the legislation on its targeting of lifestyle advertising as a principal measure for discouraging tobacco consumption. They argue that there is no existing empirical or scientific data to suggest that lifestyle advertising will induce individuals to smoke[30] and therefore the legislation amounts to little more than cosmetic measures to give the appearance that the government is doing something effective. Other critics who feel threatened by the legislation have argued that since there is no evidence of any causal linkage between tobacco consumption and advertising tobacco logos on products or events, the legislative means are not rationally connected to the objective.[31]

Tobacco companies have challenged the legislation as unconstitutional. Since the government has framed much of its legislative strategy for the new tobacco bill around the window of opportunity established by the majority, it will be interesting to see how the Court evaluates the legislation. The Court may find it difficult, politically, to rule this approach unreasonable. However, the composition of the Court has changed since the earlier legislation was struck down and at least three different judges will be on the bench when the case is next reviewed.[32] Since the new legislation raises issues very similar to those in the previous case, it invites the following question:

> *Apart from the Court's 'ownership' of the recommended suggestion to restrict lifestyle advertising, is there a coherent reason to assume that the new legislation comes any closer to satisfying the majority's requirement that it be based on "rational, reasoned defensibility"[33] as opposed to the "mere intuition" which it earlier ruled to be inadequate?*

### Twists and Turns in the Legislative Saga

As a federal election neared, and speculation increased that sporting events like the Grand Prix might not be staged because of restrictions on tobacco sponsorship, the federal government announced intended amendments to exempt the racing car industry. The announcement came shortly after Canada's three major tobacco manufacturers warned in newspaper advertisements that if the legislation was passed it would "inevitably lead to the cancellation of many events" and would cost thousands of jobs and millions of lost tourism dollars.[34]

The proposed amendment to exempt the racing industry from sponsorship restrictions drew criticism from the Reform and NDP parties, which wanted much tougher and comprehensive legislation to restrict tobacco advertising. It also exposed the legislation to even greater vulnerability in terms of satisfying the Court's interpretation of the Charter. Even with the announced exemption, Canada's three major tobacco companies, Imperial Tobacco Ltd., RJR MacDonald Inc. and Rothmans, Benson & Hedges Inc., filed a court challenge arguing that the legislation was unconstitutional. Iron-

ically, they tried to turn the exemption to their advantage, arguing that the government could hardly claim that the legislation was reasonable under the Charter since it "has shown willingness to modify restrictions on rights guaranteed by the Charter supposedly enacted by the House of Commons and by the Senate for health reasons to further its own political purposes."[35] The increased vulnerability of the legislation, if exemptions were made for political purposes, was also noted in parliament by the Reform Party:

> If the government exempts auto racing in the Tobacco Act, other groups will be sprinting to the courts. [Minister Rock] knows that. What possible defence will this government offer at that time in court for exempting one event but not others?[36]

The amendments (Bill C-42) were enacted more than a year after the original announcement was made.[37] The legislation created a five-year exemption for all events and activities that had received tobacco sponsorship before April 25, 1997 when Bill C-71 became law, likely in order to escape the vulnerability of exempting only racing. The government tried to put the best face forward on these changes, claiming that the amendments strengthened the legislation because after five years all sponsorship would be banned, which would give groups "more time to adjust and to find alternate sponsors."[38] However, a more probable explanation is that during the course of evaluating the proposed amendments, the Department of Justice warned of the high Charter risks that would be incurred if exemptions were based solely on discretionary political decisions: exemptions for only some events would be difficult to justify under the Charter as would be the argument that the legislation is rational and complies with the minimal impairment criterion.

### *Summary*

The Charter had a significant influence on all aspects and stages of developing this policy. The legislative initiative to restrict tobacco advertising was developed with careful reference to the Supreme Court's decision. Even in the face of political pressure which resulted in the government's overtly political attempt to weaken its own legislation, these attempts were almost certainly constrained by considerations of how to make the new policy more viable in the face of an inevitable Charter challenge.

The willingness to persevere with this legislative initiative, after having similar legislation struck down, does not demonstrate inaction in the face of a rights conflict. Nevertheless, the government was not aggressive in pursuing its legislative initiative. It did not question the wisdom of the Court's characterization of tobacco advertising as protected speech. It accepted, and built its response around, the judicial view that fundamental rights were at stake without pressing the alternative view that these rights are really economic interests far removed from the kind of values intended to be protected under the Charter. Furthermore, the government accepted the judiciary's suggestion about how to frame subsequent legislation, even though this suggestion had little to do with judicial expertise. This suggests that the desire to implement some aspect of the legislative initiative that would survive judicial scrutiny, at the cost of weaker legislation, was politically preferable to facing yet another Charter defeat. It was also preferred to overtly challenging the judicial decision by enacting more comprehensive measures that would almost certainly have required the controversial enactment of the legislative override — an option discussed and dismissed by Cabinet.[39]

## Rules Relating to Sexual Assault Trials

Profound judicial and political differences exist over whether legal rules for sexual assault trials and access to victims' private records discriminate against women. At issue is whether equality rights of women should be considered relevant when assessing the requirements of a fair sexual assault trial. Parliament's response to these conflicts is an important indicator of how the Charter is affecting governing. Parliament has twice passed legislation that reflects an interpretation of rights that differs in important ways from the majority Supreme Court view. This suggests that Parliament's behaviour under the Charter is not characterized by inaction but reveals its intent to change legal norms about how the Charter relates to sexual assault trials. These differences appear in the legislative responses to a trilogy of Supreme Court decisions, *R. v. Seaboyer, R. v. O'Connor*, and *R. v. Carosella*.[40] The first legislative enactment, pertaining to assumptions around consent, is discussed in this section; the second piece of legislation, relating to access to victims' private records, is considered in the next section.

### *R. v. Seaboyer*

The *R. v. Seaboyer* decision initiated the parliamentary/judicial conflict over the rules of sexual assault trials. A majority of the Court ruled unconstitutional sections of the Criminal Code, known as rape shield provisions, which prevented women's sexual histories from generally being introduced as evidence by defence lawyers. Parliament had considered this legislation necessary because judge-made rules had been highly prejudicial towards women. Judges had routinely allowed evidence of women's sexual histories, with inferences frequently made that consent in earlier circumstances in all likelihood meant that consent had been given in the incident at trial or that the woman was not a credible or truthful witness.

In 1991 the Court, in a 7-2 decision, struck down the legislation for violating the principles of fundamental justice (section 7) and presumption of innocence (section 11(d)). The Court did not question the importance of the legislation but thought its effects were too restrictive because of the potential to exclude evidence "of critical relevance to the defence."[41] The majority judgement, written by Justice McLachlin with Lamer CJ, La Forest, Stevenson, Iacobucci, Sopinka and Cory concurring, concluded that a woman's sexual history could be relevant.[42] Rather than being denied this evidence, because of legislation, the judiciary should use discretion to distinguish between necessary and irrelevant evidence.[43]

The dissenting judgement of L'Heureux-Dubé, in which Gonthier concurred, contained a sharp rebuke of those judges, particularly at the trial level, who have succumbed to biases in the law that reflect unfair, stereotypical myths about women and rape. This skepticism of judicial impartiality led to the suggestion that Parliament was justified when trying to legislate a different paradigm for sexual assault trials:

> Parliament exhibited a marked, and justifiedly so, distrust of the ability of the courts to promote and achieve a non-discriminatory application of the law in this area. In view of the history of government attempts, the harm done when discretion is posited in trial judges and the demonstrated inability of the judiciary to change its discriminatory ways, Parliament was justified in so choosing. My attempt to illustrate the tenacity of these discriminatory beliefs and their acceptance at all levels of society clearly demonstrates that discretion in judges is antithetical to the goals of Parliament.[44]

The majority's decision generated widespread concern from women's groups who believed that it would discourage sexual assault victims from proceeding with criminal charges. The decision reinvigorated criticism that assumptions in the law

with respect to sexual assault trials treat female sexual assault victims unfairly.[45]

### *Legislative Response: Bill C-49*

The federal government and Parliament were not prepared to accept the ruling as the final word on the rules governing sexual assault proceedings. After extensive consultation with women's groups, the Justice Minister was persuaded to undertake substantial changes to the Criminal Code in Bill C-49, to address the issue of consent in particular. The legislation, which received all party support, amended the Criminal Code[46] to define consent and to make it clear that relevant inferences cannot be drawn from a woman's conduct or from her previous sexual history.[47] The legislation also made it more difficult for the accused to use mistaken belief as a legal defence. Previous legislation had allowed an accused to be acquitted if he could persuade the judge or jury that he honestly believed the victim had consented. However, the new legislation requires that the accused take reasonable steps to ascertain that the complainant was consenting and it explicitly stipulates that mistaken belief about consent is not accepted where it arises from intoxication, recklessness or willful blindness.

In response to the Court's rejection of the blanket exemption on evidence of a woman's sexual past, the legislation provides judicial guidelines for determining admissibility; for example, it stipulates that evidence that a complainant has engaged in previous sexual activity is not admissible to support an inference that she is more likely to have consented to the sexual activity in question or is less worthy of belief. The legislation further stipulates that evidence of a woman's sexual history can only be included where it is clearly relevant to the issue at trial and where its probative value is not substantially outweighed by its prejudicial effects.

The legislation was controversial and reactions to it revealed profoundly different views about how to ensure a fair trial without debasing sexual assault victims. Critics of the legislation, in particular defence counsel, argued that men can honestly but mistakenly believe that a woman has agreed to the sexual act in question and therefore the preclusion of this defence would undermine the right to a fair trial. Critics also disagreed with Parliament's definition of consent, which they characterized as a "grotesquely distorted view of relations between men and women" reflecting an unrealistic vision of sexual relations more suited to contract law than "the way such things happen in the real world." These assumptions were rejected, vigorously, by a number of women's groups who argued that if men are in any way uncertain about whether consent was granted, they should take reasonable steps to ensure that their partner has consented and, if still uncertain, abstain. They also rejected the view that the legislation should be guided by "realistic vision[s] of sexual relations" which, in their opinion, perpetuate the view that women's words, when it comes to sexual relations, cannot be taken at face value.[48]

The bill was studied extensively by a parliamentary committee established for that purpose in which Charter concerns were a prominent component of political debate. Parliament addressed and responded to Charter concerns in a manner that was neither dismissive of rights-based criticisms nor intimidated by suggestions that the judiciary was the more appropriate venue for resolving conflicts over the rules of sexual assault trials.

What was most significant about political handling of this issue was the government's attempt to give a different emphasis to the conflicting rights than appeared in the Court's decision. Parliament agreed with the government's characterization of the Charter issues as involving more than the right of the accused to a fair trial and presumption of innocence; also relevant are the equality rights of women in section 15 and their security of person rights in section 7. This more complex interpretation of how the Charter should apply to this conflict

clearly distinguishes the political from judicial judgement. For the majority of the Court in *Seaboyer*, only one rights-holder has a Charter interest in this issue: the accused.

This willingness to articulate a different view of how the Charter applies to sexual assault trials is significant for what it reveals about how elected representatives are interpreting their responsibilities under the Charter. Parliament has consciously and deliberately sought to change assumptions underlying sexual assault trials. In so doing, Parliament has made abundantly clear that elected representatives are not prepared to defer to judges on all interpretations of the Charter. Its alternative assessment was made explicit in a legislative preamble for all to read — in particular, judges. The intent of the preamble was twofold: to serve as an education device for courts on how to broach sexual assault trials and to provide a statement of parliamentary intent in anticipation of a subsequent constitutional challenge to the legislation.

The preamble indicates Parliament's grave concern about sexual violence and abuse in Canadian society and its sense that judicial decisions should be made within the context of conflicting rights: those of the accused to a fair trial and the equality and security of women. It suggests that notwithstanding the Supreme Court's concerns about the exclusionary rule, Parliament is of the belief "that evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence." One does not have to strain too hard to interpret this statement as Parliament's belief that the Supreme Court has not interpreted this conflict in an appropriate manner because insufficient regard was given to the equality rights of women. A political interpretation of the preamble's message to the judiciary is the following:

> *Dear Judges: Parliament believes that the relevant Charter rights to consider in sexual assault trials are not confined to the right of the accused to a fair trial. Equality and security of women's person also must be duly considered. In drafting these legislative amendments, Parliament has been neither insensitive, unprincipled nor in denial of its responsibilities under the Charter or of the rule of law. With all due respect, this, in Parliament's thoughtful opinion, is a more appropriate and fair way of reconciling the conflicting rights and interests at issue in sexual assault proceedings.*

One can think of a preamble as representing a stage in a conversation between elected and judicial officials on how the Charter should be interpreted and applied to the particular case at hand. What is attractive about the use of the legislative preamble is that it makes explicit the concerns and intents animating legislative decisions and leaves less room for courts to ascribe objectives to Parliament. This is a more honest and forthright way of attempting to justify a legislative objective than relying on government lawyers to speculate, after the fact, about the reasons behind a legislative decision. At this early stage in Charter jurisprudence it is difficult to assess what influence preambles will have in convincing judges about the reasonableness of Parliament's legislation. However, the intent to educate trial court judges and change their legal assumptions (at least in the context of sexual assault cases) does not appear to be as effective as Parliament may have wished.

### *Parliament's Intent to Define Consent Upheld*

Parliament's tough rules, which made it difficult for an accused to suggest that he was mistaken about whether consent was granted, were at issue in *R. v. Ewanchuk*.[49] A unanimous Court in February 1999 upheld the legislative intent of ensuring that consent is explicitly granted. In this case, the accused initiated several sexual advances toward a woman, despite her repeated statements of "no." He was acquitted at trial of sexual assault in which his defence was that con-

sent had been implied. The Court upheld the appeal of his acquittal and used its discretion to enter a conviction against him.

The Court ruled that in sexual assault cases, where an accused argues mistaken understanding, the judge must be convinced that the accused "honestly believed *that the complainant had communicated consent*." Any other belief, however honestly held, is not a defence. Furthermore, for this claim to be accepted, the accused's mistaken belief "cannot be reckless, willfully blind or tainted by an awareness of any of the factors" enumerated in Bill C-49. At any point, if the woman has expressed a lack of agreement to engage in sexual activity, "it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established *before* he resumed his advances."[50]

Justice L'Heureux-Dubé who accepted the principal judgement, written by Justice Major, felt compelled to speak out against what she considered to be prejudicial and discriminatory statements by the Court of Appeal. In supplementary comments, she indicated her concern with the statement of Justice McClung that the complainant did not present herself to the accused "in a bonnet and crinolines." This statement, in her view, should not be condoned:

> [These comments] help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying "no," she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of "good" moral character.[51]

L'Heureux-Dubé stated that the Court of Appeal's treatment of this case does not dispel the concerns she expressed in *Seaboyer* about why Parliament was justified in attempting to halt judicial reliance on myths and stereotypes in sexual assault complaints:

> Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The Code was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.[52]

## Access to Victims' Private Records

Within a few years of Bill C-49's passage, women's groups and those who work with rape crisis centers became alerted to a new trend in sexual assault cases: defence counsel seeking and receiving access to a wide range of women's private medical and therapeutic records. Women's groups attribute this to defence counsels' determination to discourage women from pressing sexual assault charges by finding alternative ways to introduce prejudicial assumptions about women's credibility or by intimidating victims to withdraw their charges.[53]

In 1995 the Supreme Court in *R. v. O'Connor* ruled on whether defence lawyers in sexual assault cases can get a judicial order to compel those who have access to a women's confidential records (counsellors and doctors who have treated alleged victims of sexual assault) to produce these for defence purposes. The jurisprudence had been unsettled on this issue. The Supreme Court ruled that these records are relevant, but split five to four on what the law should be governing the release of records.

### *The Supreme Court Ruling*

The Court was profoundly divided, not just in the sense of the vote, but on whether judicial interpretation of legal rules discriminates against women and on the relevance of equality considerations in the context of sexual assault cases. The question of access to women's private records arose in the trial of a bishop of the Roman Catholic Church who was charged with rape and indecent assault relating to incidents alleged to have taken place between 1964 and 1967 when he was the principal of a native residential school. The presiding judge issued an order requiring disclosure of the complainant's entire medical, counselling and school records in response to the defence counsel's argument that this was necessary to test the complainants' credibility. This court order was made without any inquiry into the relevance of the records or consideration of how to balance a complainant's privacy right with the right of an accused to a fair trial.

When the Supreme Court reviewed this issue, a core assumption in the majority's ruling, written by Sopinka with Lamer CJ, Cory, Iacobucci and Major concurring, is that access to therapeutic records should not be difficult because these may often be relevant and necessary for full answer and defence in a fair trial. The majority established a low threshold for demonstrating relevance; the accused should not be placed in a "Catch-22" situation of having to make submissions to the judge without precisely knowing what is contained in the records.[54] The majority ruled that information contained in third party records might be relevant in sexual assault cases in the following circumstances:[55]

i) they may contain information concerning the unfolding of events underlying the criminal complaint;
ii) they may reveal the use of a therapy which influenced the complainant's memory of alleged events;
iii) they may contain information that bears on the complainant's credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory after the alleged event.

Once likely relevance has been established, the trial judge must determine whether these records should be available to the accused. This requires that the judge weigh "the salutary and deleterious effects of a production order" and determine whether a decision not to provide the accused with access "would constitute a reasonable limit on the ability of the accused to make full answer and defence." In the majority's view, decisions about access to women's private records involve a "balancing process" that must recognize the competing claims of a constitutional right to privacy with the right to full answer and defence. However, the right to privacy should not result in the "possibility of occasioning a miscarriage of justice" by unduly restricting an accused's ability to access relevant information.[56]

The dissenting opinion differs significantly in a number of important respects. The minority established a substantially higher threshold for demonstrating likely relevance, attached far greater importance to privacy, claimed that equality should be considered when determining whether defence counsel should gain access to women's records, and suggested that judges keep in mind "the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences."[57] This opinion, written by L'Heureux-Dubé with McLachlin, La Forest and Gonthier concurring, characterized the assumption that private therapeutic or counselling records are necessary to a full answer and defence as "highly questionable"[58] and suggested that access to these records is more likely "to derail than to advance the truth-seeking process."[59] Both privacy and equality rights justify "a presumption against ordering" production of women's records.[60] Equal-

ity is relevant because sexual assault overwhelmingly affects women, children and the disabled.[61]

The minority noted that courts should be aware of the "pernicious role" that past evidential rules in the Criminal Code and the common law have played in the legal system and cautioned judges to be careful "not to permit such practices to reappear under the guise of extensive and unwarranted inquiries into the past histories and private lives of complainants of sexual assault."[62] A legal system should not devalue the evidence of complainants of sexual assault by *"presuming* their uncreditworthiness"[63] and judges should be sensitive to the difference that vulnerability and gender may make in the application of criminal justice rules.[64]

Another significant departure from the majority's reasoning was the minority's reconciliation of conflicting rights in this conflict. As important as is the right to full answer and defence, it must "coexist with other constitutional rights, rather than trample them."[65] In the minority's view, the notion of balancing conflicting rights is the wrong imagery for sexual assault trials because access to women's records is rarely necessary for a fair trial and restrictions on access might actually enhance privacy and equality.[66]

### *Public and Political Responses to Majority Decision*

The majority's decision alarmed women's groups who believed that it established too low a threshold for obtaining access to private records. Critics argued that the ruling reinforced "destructive myths" associated with sexual assault, for example that women who report rape, as opposed to other crimes, are likely to be "liars, discreditable, or easily duped."[67] Some predicted that women would be forced to choose between reporting sexual assaults and seeking therapy to deal with its traumatic effects,[68] while others suggested sexual assault centres would do whatever is necessary to ensure a women's confidentiality, including the shredding of documents and no longer taking detailed notes at counselling sessions.[69] Commentators also speculated that the Court's decision would hurt sexual assault centres unable to afford the expenditures of time and money involved in challenging subpoenas for records and attending court, which would reduce the support available for victims.[70]

Following the decision, the federal government introduced Bill C-46 in reaction to what it considered too low a threshold in the majority opinion for gaining access to private medical records. In a press release, the Department of Justice suggested that the "public's confidence in the criminal justice system is weakened when complainants' records are disclosed without regard to their Charter rights to privacy and equality."[71]

### *Bill C-46: Choosing the Minority Judicial View*

Bill C-46 establishes a different two-stage process for obtaining access to records and imposes criteria considerably more difficult to satisfy than those set out in the majority *O'Connor* judgement. Underlying the legislation is the assumption that women's private records are neither as relevant, nor should access be as frequently granted, as suggested by the majority. The legislation does not contradict the majority's conclusion that the Charter requires that records be produced where the accused establishes their likely relevance to an issue at trial. However, the legislation seeks to influence how judges decide whether relevance has been established. It does so by stipulating, in the first stage, that certain grounds used in the past by defence counsel to obtain access to women's records are not, on their own, sufficient for establishing relevance.[72] The legislation also differs from the majority decision by imposing additional criteria the judge must assess before ordering that records be produced:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;
(d) whether production of the record is based on a discriminatory belief or bias;
(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
(f) society's interest in encouraging the reporting of sexual offences;
(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
(h) the effect of the determination on the integrity of the trial process.

What is significant about the legislation is how closely it resembles the minority view that in addition to the accused's right to make a full answer and defence, equality and privacy rights are also necessary considerations in an order to produce medical records. The factors that judges are expected to take into account are almost identical to those cited in the dissenting judgement, of which the majority accepted the first five (a-e) but not the last three (f-h). The majority rejected explicitly the idea that privacy should be considered during the inquiry for production stage, suggesting that this would unduly restrict an accused's access to information which may be required for a full answer and defence,[73] and did not agree that equality was relevant at either the inquiry for production stage or the release of records to defence counsel.[74]

The legislation also differs from the majority decision in two other ways. In the second stage of the process (sharing materials with the defence) it stipulates that equality should also be considered. Furthermore, it imposes different disclosure requirements on the Crown. The majority ruled that whenever a woman's records are in the hands of the Crown, the woman ceases to have a privacy interest in them and the Crown is required to disclose these to the defence.[75] However, the legislation forbids the production of a record relating to a complainant or witness unless that individual has expressly waived his or her privacy rights.

### *Interest Group Submissions*

Bill C-46 was subject to considerable comment by interest groups who appeared before the House of Commons Committee on Justice and Legal Affairs. Debate about the bill was reminiscent of the debate five years earlier on Bill C-49, with opinion sharply divided on whether the legislation was constitutionally valid. As before, reconciliation of competing views was hindered by profound differences in philosophical and conceptual understandings of the law and how legal sexual assault rules affect women.

Rights claims were a prominent feature of commentaries both critical and supportive of the legislation. Criminal defence lawyers viewed the accused as having the only relevant Charter consideration and argued that the right to a fair trial is unduly restricted by other legislative considerations that establish "artificial hurdles" for determining whether records are likely relevant to a full defence. In their view, the legislation changes the standard for the production of records from one of presumptive production, emphasized by the majority in *O'Connor*, to presumptive exclusion. Consequently, the legislation "[would] have the effect of depriving accused persons of relevant information"[76] and would create a "significant potential for miscarriage of justice" that would be "a disgrace to the administration of justice."[77] Criminal lawyers were particularly troubled by the legislation's removal of unlimited judicial discretion to determine which third party records can be called forward. They argued that the legislation would not withstand Charter scrutiny because it improperly reflects a hierarchy of rights, in which the protection of the accused is accorded a lower priority than complainants' privacy rights.[78]

Women's groups and service providers, particularly those representing rape crisis centers, also invoked Charter rights in their arguments in support of the legislation. But the rights central to this issue, from their perspective, were equality, privacy and security. They rejected the claim that the legislation would compromise the right of an accused to receive a fair trial because private records will be rarely, if ever, relevant.

> Bill C-46 will not deprive any accused person of a fair trial. It will deprive them of the benefit of a selective interpretation of the Charter, which persistently disregards some of the Charter's provisions and some citizens' equal right to equal protection and benefit of criminal law and constitutional law. In particular, Bill C-46 will correct for the constitutional blind spot now consistently revealed by a very bare majority of the Supreme Court of Canada in O'Connor and Carosella.[79]

Although many women's groups do not accept the relevance of private records, they nevertheless support the legislation for addressing what they consider to be inappropriate judicial rules and approve of Parliament's intent to introduce equality, privacy and security rights into judicial determinations.[80]

### *Preamble*

The legislation received support from all parties and was prefaced with a preamble stating Parliament's intent. The preamble reveals Parliament's view that court orders for access to private records should consider a number of Charter rights: equality, dignity, and privacy, as well as a fair trial. While the production of private medical records may be necessary "for an accused to make a full answer and defence," it may also breach rights to privacy and equality; hence these judicial determinations "should be subject to careful scrutiny." The preamble does not explicitly rank these conflicting rights (no doubt because of the Court's explicit aversion to promote a hierarchy of conflicting Charter rights).[81] Nevertheless, it contains an implicit message to the judiciary: courts, in the past, have not given due regard to other relevant Charter rights and the purpose of this legislation is to establish a more balanced set of rules to govern requests for access to private records.

Parliament's use of a preamble, and the messages to the judiciary it conveyed, prompted varied reactions from interest groups. Those supportive of the legislation approved of the preamble and its message that access to private records should be assessed in terms of the adverse effects for equality and privacy rights. Any reservations about the clause from women's groups concerned its placement in the legislation. Rather than stating in a preamble Parliament's intent and theoretical assumptions about how the law should operate, many would have preferred to see these important statements in the actual text of the Criminal Code. Their concerns were that the educative and theoretical messages would too easily be forgotten by the judiciary when interpreting and applying the legislation.[82]

The very fact that this issue of access to private medical records in sexual assault cases has become a serious concern reinforces skepticism about the educative value of preambles. As discussed earlier, the preamble in the rape shield legislation, Bill C-49, had similarly stressed the importance of equality and women's security in sexual assault proceedings. However, this earlier preamble does not seem to have had an influence on the judiciary, which has steadily compelled the production of private medical records allowing defence counsel to impeach the complainant's character. Despite the preamble, judicial practices have allowed, indirectly, what the legislation explicitly prohibited. As one commentator notes, judicial history after the *Seaboyer* decision demonstrates "when the preamble does not form part of the text itself, part of the law is lost, never to be referred to by any trial judge in this country."[83]

Not all participants in the debate support the preamble. Those who were critical of the legislation were, not surprisingly, also critical of the preamble.

They disputed the legitimacy of Parliament's desire to interpret the Charter differently from the Court and were particularly offended by this bold pronouncement of intent which they considered to be beyond Parliament's competence: only courts can validly interpret the Charter.[84] Defence lawyers considered the preamble to be an affront to the judiciary because of its implicit suggestion that "the judiciary cannot be trusted to examine third-party records" or to "reach a proper determination." In their view, it is "a sad day" when legislation with this message to courts is passed.[85]

### *Additional Incentive to Pass Legislation: R. v. Carosella*

Two days after the introduction of Bill C-46, the Supreme Court in *R. v. Carosella* handed down a decision which provided additional incentive to pass the legislation.[86] The issue in this case was how to proceed in sexual assault trials when a claim has been made for access to private records which have been destroyed; under these circumstances is the right of an accused to make a full answer and defence breached and should the proceedings against him be stayed?

Once again, the Supreme Court split five to four on how to assess the relevance and necessity of access to private records for a fair sexual assault trial. The decision revealed even stronger philosophical disagreements than in *O'Connor*, with the same judges represented on the majority and minority sides.

The majority stated that disclosure is a component of the right to make full answer and defence. Consequently, if the destroyed materials satisfy the *O'Connor* threshold test for disclosure or production, the section 7 right of the accused is breached.[87] The majority established new guidelines to determine what remedy is appropriate in sexual assault cases where the standard for relevance is met but the records have been destroyed. Either one of the following two factors justifies a stay of the criminal charges:[88]

1) no alternative remedy exists to overcome the prejudice to the accused's ability to make full answer and defence, and
2) if irreparable prejudice to the integrity of the judicial system were to arise with the continuation of the prosecution.

In this case, the majority concluded that both conditions were satisfied and suggested that confidence in the system would be undermined if the Court condoned conduct designed to defeat the processes of the Court, particularly by a sexual assault centre or similar organization "that not only receives public money but whose activities are scrutinized by the provincial government."[89]

The dissenting judges disagreed that there is a right to disclosure as part of section 7, suggesting that while the production of every relevant piece of evidence might be an ideal goal from the perspective of the accused, this goal should not be elevated to a right, the non-observance of which leads instantaneously to an unfair trial. Where evidence is unavailable, it is not enough to speculate that there is the potential for harm. For missing evidence to violate the Charter "there must be a real likelihood of prejudice to the right to full answer and defence, in that the evidence if available would have been more likely than not to assist the accused."[90] The dissenting judges also thought that had the trial judge conducted a proper inquiry into the need for these documents, the "likely relevant" test of *O'Connor* would not have been satisfied. Defence counsel's request for production of these notes "amounted to no more than a fishing expedition in the hopes of uncovering a prior inconsistent statement."[91]

### *Summary of Parliament's Intent to Change Legal Norms in Sexual Assault Trials*

The intent of changing legal assumptions about consent in Bill C-49, the rape shield legislation, appears to have had limited success. The Supreme

Court seems to have accepted this as valid, constitutional action. Of course, much will depend on how trial judges interpret this legislation and the recent message conveyed by the Court in *Ewanchuk*.

Whether Parliament will be successful, on the other hand, in convincing the Court to accept its views with respect to access to medical records remains to be seen. Bill C-46 came into force in April 1997.[92] This attempt to legislate a different interpretation of the Charter is certainly contentious. While many are pleased that Parliament is not shirking from its social and policy responsibilities because of the Charter, not all agree that it is appropriate for Parliament to legislate in a manner that deviates in significant ways from relevant judicial pronouncements.

The legislative rules for granting access to private records raise an interesting dilemma for lower courts: which interpretation of the Charter should they follow, that of Parliament or the Supreme Court? A handful of trial judges have had to make this decision but no clear pattern is emerging in lower court jurisprudence.[93] The Supreme Court will eventually rule on the validity of the legislation and will have to decide if it is prepared to overturn the clear intent and obvious will of Parliament.

Parliament has clearly been more persuaded by the dissenting judicial view than the majority opinion on this issue. But does this preference for the minority over majority judgement render the legislation unreasonable? Ideally, since the Court itself is so profoundly divided on this issue, the majority will have sufficient humility to accept that reasonable differences of opinion exist on how to reconcile the conflicting issues and that Parliament's legislative scheme is reasonable and acceptable, particularly since it so closely resembles the views of four of the nine justices of the Court.[94]

Should the legislation be invalidated, Parliament will have to decide how to respond. If Parliament is determined to ensure the primacy of its views on this question of access to private records, revising legislation may not be an option. This is because the conflict in this case is not about how to perfect the legislation, in terms of reasonableness, but instead reflects substantive differences over which rights are relevant in sexual assault trials and how these should be reconciled. Parliament will have to decide if it feels strongly enough about its view to engage the constitutional mechanism for resolving such profound stalemates: the legislative override.



## Assessing Political Responses to Charter Conflicts

The Charter has changed the political environment and climate of legislating and in the process has tested political resolve to pursue controversial and complex initiatives that attract substantial rights-based concerns.

The policies examined here demonstrate the Charter's substantial influence on legislative choices at all stages of the policy process; from initial conception, parliamentary debate, and beyond, to the political decision of how to respond to judicial decisions that legislation is unconstitutional. When assessed in light of two contrary expectations of the Charter's effects on political will, it is apparent that neither view fully captures how the Charter is affecting the policy process.

Firstly, political response has not been characterized by inaction in the face of Charter conflict. In the case of tobacco legislation, the government revised its initiative and passed new legislation in an attempt to pursue its objective through means it hoped would receive judicial approval. But Parliament could have been more assertive in pursuing its preferred course of action. Despite the marginal nature of the speech claim, it did not challenge the Court's assessment of the issue as involving a fundamental conflict around free speech and it adopted less comprehensive measures than those struck down.

Legislative initiatives addressing the rules for sexual assault trials and access to private records provide stronger indication that Parliament is not reneging on the responsibility to pursue what it believes to be important social policy when rights conflicts arise. Parliamentary views on sexual assault issues indicate not only that elected representatives have a different assessment of how the law should operate, but that Parliament believes it has a legitimate role to play in interpreting the Charter. Parliament's passage of legislation that differs significantly from judicial views is not explained by a denial of the rule of law or dismissal of the priority of constitutional values and obligations. It is also not explained by ignorance of the Charter or the triumph of partisan, electoral or other self-serving interests over rights-based principles. Rather, these legislative initiatives are based on a deliberate and conscious intent to change the prevailing normative and legal assumptions for sexual assault trials and to alert the judiciary to an alternative interpretation of the Charter which situates trial fairness in a broader context of respect for other Charter rights (privacy and equality).

These policy debates, at first blush, may give the impression that the Charter has had a largely salutary effect on the political process, by focussing greater attention on the rights dimensions of policies. However, the optimistic view that the Charter is promoting dialogue about how to improve legislation, to ensure that policy is achieved in a rights-conscious and sensitive manner, is too simplistic a portrayal of the Charter's effects on policy or the options available to Parliament. The policies examined here suggest at least three caveats to this optimistic interpretation.

The first caveat is that a dialogue between Parliament and the judiciary may not be the appropriate means of resolving all policy conflicts involving rights-based claims. The tobacco legislation raises the question of whether this issue should have even been dealt with under the Charter and subject to its constraints. What is troubling in this case is that at no stage of the debate did it seem to matter that the "fundamental" Charter right at stake — tobacco advertising — was not a right in any philosophical sense but a right created by judicial decree. The government did not contest the claim that tobacco advertising deserved constitutional protection (in fact it conceded that speech had been infringed). Nor did it discuss publicly whether its objective warranted more comprehensive legislation which, given the Court's prior ruling, would inevitably have led to discussion of whether the enactment of the legislative override was justified.

When the judiciary pronounces not on human rights but on exaggerated or misappropriated rights claims it intervenes into policy conflict rightfully resolved elsewhere. This decision and the political reluctance to challenge the use of rights discourse in this context had important consequences. Most obviously, it allowed this conflict to be reviewed in the judicial arena rather than in the realm of representative politics and, in so doing, changed the manner in which the relevant issues were identified and assessed, by whom, and according to what criteria. Instead of Parliament assessing the legislation in terms of workability and practicality, judges reviewed it but from an entirely different perspective: whether the objective was rationally connected to the means and whether its effects impaired rights as little as some other, hypothetical strategy.

It is understandable why a government may not welcome the possibility of another judicial setback and consequently will devise legislation to satisfy a specific judicial suggestion. But when a renewed legislative initiative is designed to correspond to a judicial suggestion about complex policy options it is entirely possible that more appropriate guidance, which draws upon previous trials and errors, comparative experiences and informed best estimates, will be forsaken. A consequence may be impractical or less effective leg-

islation that casts doubt on the purported benefits of constitutional dialogue.

A second caveat is that the Charter conflict between Parliament and the judiciary may be far more profound than can be remedied by simply improving or revising legislation. The issue of access to victims' private records reveals philosophical differences within the judiciary and between the Supreme Court majority and Parliament about how the Charter speaks to this conflict and how conflicting rights should be reconciled. Parliament may be engaged in dialogue with the Court but it is not around the issue of whether and how the legislation can be improved to satisfy Charter requirements of reasonableness. Instead the purpose is to convince a majority of the Court and trial judges that Parliament's is a more balanced and fair reading of how the Charter applies to sexual assault trials. The Supreme Court's ruling on the legislation will reveal the utility of this dialogue. However, the likelihood of disagreement over principles, rather than simply legislative means, suggests that more than dialogue may be required. The Canadian polity needs to give more thought to how these more fundamental institutional disagreements should be resolved.

A third caveat is that even if Parliament can satisfy judicial concerns when revising legislative initiatives, its will can be undermined by back-door legal means. This has occurred, with judicial approval and in the name of the Charter, in the form of defence counsel gaining access to women's private records to attack sexual assault complainants' credibility despite the explicit stipulation in legislation that such evidence is inappropriate and may not be lawful, according to the Criminal Code.



## Augmenting Parliament's Role: Establishing a Charter Committee

Despite these caveats, the idea that the Charter should be the subject of institutional dialogue is a desirable ideal. Constitutional dialogue or conversation requires listening and responding to the other party's concerns (I prefer to think of it as conversation because less structure or formality is implied). Legislation should be crafted with careful consideration not to impair rights unduly. If legislation is challenged, and Parliament is committed to its policy objective, it should try to respond to the Court's concerns where possible. On the other hand, conversations do not necessarily imply or produce agreement. There may be times when judicial suggestions are not appropriate or where fundamental disagreement arises on the basic interpretation or application of the Charter. Addressing these differences is where the Charter presents the most difficult and challenging dilemmas for governing.

The inevitability of institutional disagreements has serious implications for policy. If Parliament is to be a significant partner in a constitutional conversation, its processes for Charter evaluation of legislation need to be reassessed. Elsewhere, I have argued that Canada should establish a parliamentary committee with specific responsibility to evaluate bills from a Charter perspective.[95] Although in each chamber a committee may look at the rights dimension of a bill as part of its larger mandate, Parliament would benefit from adopting a more conscious and systematic approach to Charter scrutiny by vesting this task in a specific committee. This would allow for specialization and the cultivation of greater expertise of members (who should not be drawn exclusively from those parliamentarians with legal training). The committee's role would include not only discussion of the sig-

nificance of possible rights claims but the justification for legislative decisions.

A Charter committee would benefit from receiving a statement from the Justice Minister which explains the conclusions reached in the government's internal assessment: for example, the degree of risk and the particular Charter concerns identified.

It is important to distinguish the purpose of parliamentary scrutiny from the kind of Charter analysis that takes place within the executive. Clearly, a system of executive-based rights scrutiny is welcome. For public officials in departments and agencies and ministers who bear ultimate accountability, it provides necessary advice about specific legal difficulties that can be anticipated and enables ministers to revisit policy objectives, assess alternative means, and ultimately make more responsible decisions about whether to recommend that legislation be introduced. But since this information is generally confidential, and the evaluation of bills is ultimately a parliamentary responsibility, parliamentarians need adequate resources and skills to conduct their own assessments of legislation from a Charter perspective.

The purpose of a parliamentary Charter committee would be different from bureaucratic scrutiny. Its role would not be to establish a rival or parallel procedure for undertaking risk assessments as the basis for making policy decisions. Rather its purpose would be to ensure that legislative decisions, which have implications for fundamental rights, are made only after more public deliberation. In short, its role would be to provide a foundation for Parliament's collective and principled judgement about whether polices are important and responsible in light of the Charter and consistent with the values of a free and democratic society.

The object of a Charter committee is not to present a roadblock to legislative options whenever Charter concerns are raised. The claim for a right is often a shorthand or abbreviated form of a more complex argument about the importance of certain kinds of normative considerations and how these should be factored into policy deliberations. Definitions and understandings of rights are neither universal nor uncontested. Rights claims should be seen as part of a complex political process in which political actors must evaluate their strength alongside the importance of a legislative objective. The issue is not whether a free-standing right should dictate particular outcomes or direct the resolution of social or political conflicts in a singular manner. Rather, the relevant considerations are whether legislation is warranted, given the seriousness of the rights infringement and the importance of the policy objective and, if so, how the legislative objective(s) can be pursued in a manner that respects rights as much as is reasonably and practically possible.

Since this committee would be an important reflection of Parliament's undertaking to interpret and apply constitutional principles to legislative decisions, it should be viewed as one of the more important and coveted responsibilities for parliamentarians. Although parliamentary committees typically have weak influence, and members are prone to partisan pressures, a Charter committee would likely be in a stronger position to exert influence and enjoy some degree of independence from partisan constraints. The important role this committee would assume when assessing proposed legislation in light of the Charter would likely draw judicial notice, particularly if its concerns or queries were not addressed by the government. This is not to suggest that a government should be obliged to heed a Charter committee's concerns, but when in disagreement, it should be expected to defend its viewpoint.

If Parliament allows courts to settle contentious issues, without first making its position known by passing legislation that has carefully considered how to pursue the objective in a rights-conscious

manner, it will have forfeited the opportunity to influence judicial decisions. If Parliament is seemingly cavalier about Charter obligations, the judiciary will have little incentive to defer to Parliament's legislative intent. Consequently, legislation may be struck down. After that, if Parliament disagrees with a legal interpretation that produces a different outcome in social conflicts, it will have to introduce new legislation, which may incur increased policy, political and fiscal costs. Alternatively, it will have to rely on the blunt and controversial response of enacting the legislative override.

Another reason for establishing a parliamentary Charter committee is to make legislative decisions that restrict rights more accountable and transparent. This is important from a democratic standpoint because the inevitable discussion and debate will put pressure on governments to justify and, where warranted, amend bills. But it is also important as part of the conversation with courts which will arise when legislation is challenged under the Charter. The availability of a public record of debate that focuses directly on Charter issues, the considerations that have influenced legislative decisions, and the policy arguments about justification, will be invaluable for judicial assessments of the reasonableness of impugned legislative decisions.

This suggestion for a parliamentary Charter committee differs in an important respect from a recommendation by the Reform Party to establish a judicial review committee that would systematically review Supreme Court decisions that find federal laws in contravention of the Charter. In the Reform proposal, a parliamentary committee would consider whether to refine legislation to address the court's objections or to use the notwithstanding clause to retain the law, unchanged. From my perspective, this emphasis on responding to Charter concerns only after legislation has been struck down is misplaced. Parliamentary scrutiny should occur before legislation is drafted. As Peter Russell questions, "Why should Parliament wait until the horse is out of the barn to consider the Charter implications of legislation?"[96]

Reform Party leader Preston Manning does not seem inclined to consider parliamentary scrutiny before legislation is enacted. In his view, prior review of legislation will not likely do much "to rein in judges."[97] I'm not convinced he is correct. A clearly documented parliamentary record, in which both the committee and government address specific Charter concerns and explain the reasons and rationale for the legislative objective, will be difficult for judges to discount. Judges will have to be extremely confident in their objections to legislation before ignoring a clear and transparent record of Parliament's intents and concerns. Courts have never before had to consider, systematically, Parliament's thought processes where rights are implicated. While snippets of parliamentary records have been introduced by government lawyers when litigating Charter conflicts, the lack of any systematic and routine parliamentary assessment and government explanation, at the time of policy development, have made these records easy to ignore as mere anecdotal evidence of witnesses who have appeared before various parliamentary committees.

More importantly, from a democratic perspective, Manning's criticism misses the point. Quite independent of whether courts will be influenced by the committee's scrutiny of legislation, Parliament owes it to itself and to Canadians to take a more active and independent role to interpret and apply the Charter to social policy and to exercise its collective judgement about whether legislation is constitutionally justified. Charter scrutiny should be proactive and not simply reactive.

If a Charter committee is effective, it will facilitate meaningful debate about the implications of legislation for the Charter and prompt the government to justify and, where warranted, amend its legislation. From more careful parliamentary scrutiny will come more reasonable legislation.

From a more conscious and transparent parliamentary Charter debate, the reasonableness of legislative decisions will also become more apparent. For both reasons, courts will have less cause to set aside legislation.

Still, institutional disagreements will not end simply because Parliament has taken its responsibilities under the Charter more seriously. This raises the question of how Parliament should proceed in the wake of a negative judicial ruling. Some might suggest that if an effective Charter committee is in place it will already have contributed to the creation of legislation that Parliament considers defensible under the Charter. So if the Court disagrees, what is the point of further deliberation? If Parliament is committed to its legislation, why not simply resolve the disagreement by enacting the override?

From my perspective, it may be premature to respond to a negative ruling with immediate consideration of the override. Before taking that step, careful consideration needs to paid to why the Court was troubled with the legislation.

Courts have the prerogative to disagree with parliamentary decisions, no matter how careful or thoughtful these were. Judges may flatly disagree with Parliament's contention that its objective is important enough to restrict rights or they may fault the legislation on how it was conceptualized and designed. While judges' opinions are not necessarily the definitive word about how best to resolve contentious rights conflicts, their concerns should be given careful attention. Often legislation can be revised without compromising the legislative objective. If not, it is essential that Parliament give careful consideration both to whether the right in question is too fundamental to be overridden and to whether the objective is important enough that it justifies being given primacy in the social conflict.

Although I do not disagree philosophically with the override, it is not obvious to me that a Charter committee itself should initiate suggestion of its use. If parliamentarians are concerned about the implications of a judicial ruling, they can make suggestions about the appropriate course of action in the normal channels of parliamentary debate. A concern I have with a Charter committee suggesting the override is that this risks transforming what should be an option of final resort into an option of first response to a negative judicial decision. Although the Reform proposal does not preclude modifications to legislation, the very fact that consideration of the override would be in the Committee's terms of reference might increase incentives to use this heavy-handed approach.

If the government decides to use the override in response to a negative judicial ruling, the Charter committee would be an ideal venue for careful study of whether its use is appropriate. The Charter committee should conduct hearings that would facilitate public and political deliberation about the seriousness of the potential rights deprivation. This would reflect the assumption that reliance on the override should be extraordinary, rather than ordinary, and used only on rare occasions when further conversation (or redrafting) is pointless because Parliament is convinced about the justification for its policy and believes that judicial concerns are misplaced.

The override should not be used to simply vent frustration with a judicial decision. I also have difficulty with the idea that Parliament might override equality or what I consider to be other "core" rights essential to ensure the fair treatment and dignity of all citizens (though this argument will have to be developed and explored elsewhere). It also follows, from the emphasis placed on the advantages of conversation, that the override should never be used pre-emptively, before a ruling from the highest court, because this would deny the polity the benefit of hearing judges' contribution to constitutional deliberations.

The attention that would accrue to parliamentary conversation about the override is important and should place those who advocate its use in the position of having to respond to critics' concerns that the action is unjust or based on unfounded or unjustified prejudices. The significance of this conversation, which places an onus on those who support using the override to justify their position, cannot be overstated. The demand for reasons and principles, publicly expressed, that justify the restriction of a protected right makes it much harder to hide behind prejudices or traditional preferences that may no longer be valid policy considerations. The controversy generated from a discussion about using the override should compel parliamentarians to search their conscience and satisfy their convictions that the use of the override is justified in what should be a free vote, independent of partisan constraints, and perhaps sustained by a larger than normal parliamentary majority.

## Conclusions

Too often political and academic commentators assume that the Charter's guidance for policy conflicts is a matter for judges alone to determine. A bill of rights represents more than a codified set of principles that judges interpret and apply when state actions are challenged. It represents a normative and symbolic statement of those rights and values that a society believes ought to be respected in, and by, the polity. Although judicial review is an important element in ensuring that rights are duly protected, it is wrong to assume that Parliament does not also have an important role to play when assessing government or private bills and determining, normatively and philosophically, whether and how the Charter should constrain legislative decisions.

Ideally, as political thought matures on how the Charter affects governing, parliamentarians will develop more rigorous methods for assuming responsibility to assess whether legislation is constitutionally justified. The government needs to recognize that whatever executive scrutiny has taken place, Parliament still has a legitimate role to perform when evaluating bills from a Charter perspective. It can facilitate this by supporting the creation of a Charter committee and by providing committee members with a summary or analysis of the government's Charter concerns and how the Charter has influenced the development and design of proposed legislation.

A systematic and proactive approach to the Charter will signal to judges that Parliament has been mindful of the Charter and has exercised its informed judgement about how the Charter should be interpreted and applied to social policy. This message will be conveyed via the parliamentary record of debate and by continued uses of preambles and will afford judges a more full and complete appreciation of the purposes of legislation and the reasons for choosing particular policy means.

As Parliament's approach to the Charter matures, this may influence how the Supreme Court approaches its task of judicial review. The acknowledgement earlier in the paper of a lack of judicial expertise in evaluating complex policy objectives should not be construed as a claim that judicial review of legislative decisions is inherently inappropriate or undesirable. When fundamental rights are affected by legislation, judicial review performs the salutary role of requiring governments to justify their choices in light of the seriousness and severity of the rights infringement. Under these circumstances this judicial role may present some tension for democratic principles of representative government, but is desirable and defensible in light of other aspects of democracy that emphasize the equal treatment and fair participation of all in society. However, an important distinction needs to be made between evalu-

ating rights and scrutinizing the minute details and fine tuning of complex legislative choices.

The record that would accompany a Charter committee, revealing the full extent to which Charter considerations did or did not influence the objective and the choice of policy means, would certainly be an advantage for the Court. If confident that Parliament has been sensitive towards the Charter, the Court may be more willing to respect parliamentary decisions about how to achieve complex social policy objectives. On the other hand, if the record is superficial and does not reflect careful thought, or has raised serious concerns that have not been adequately addressed by the government, the Court may be understandably reluctant to defer to legislative decisions.

Parliament may not always arrive at the same conclusions as courts about what priority should be given to rights claims or how conflicting rights and values should be reconciled. But institutional disagreements should not be thought of as a disadvantage to democratic politics. The Charter introduces a dynamic force into the policy process that requires more attention be paid to whether and how policies undermine important rights. Judicial review, and the prospects of nullifying legislation that does not comply with the judiciary's interpretation of the Charter, enhance the pressure to comply with constitutional values. Yet this increased focus on rights need not result in frequent or destabilizing conflicts. This is the genius of the Charter's contribution to the Canadian polity.

Parliament can rely on the override to resolve serious political/judicial differences. However, Parliament's power to override judicial decisions is not simply the retention of the principle of parliamentary supremacy, unadulterated, as it existed prior to the Charter. This residual element of Parliament's supremacy does not diminish Parliament's obligation to give effect to the Charter's values in the course of developing and passing legislation. Changes to the Canadian political landscape due to the Charter have been too significant to allow for this power to be invoked easily or uncritically. Although Parliament has the power to ensure the primacy of its decision, this power should be exercised only after careful consideration of why its views on an issue deserve to be paramount. Effective processes to facilitate meaningful public and political debate about the merits of Parliament's judgement will provide protection against misuse of this important power.



**announcement**

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## Notes

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1 Section 33 (1) provides that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

2 Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989).

3 Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," *The Canadian Bar Review*, Vol. 61, no. 1 (March 1983), p. 52.

4 Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)," *Osgoode Hall Law Journal*, Vol. 35, no. 1 (Spring 1997), pp. 104-05.

5 Janet L. Hiebert, "Parliament, Courts and Rights: Sharing the Responsibility for Interpreting the Charter," in Alain Gagnon and James Bickerton (eds.), *Canadian Politics*, 3d ed. (Toronto: Broadview Press, forthcoming 1999); "Why Must a Bill of Rights be a Contest of Political and Judicial Wills? The Canadian Alternative," *Public Law Review*, Vol. 9 (March 1999).

6 This requirement arises in section 4. 1 of the *Department of Justice Act* and is a similar obligation to the reporting requirement still in force in section 3 of the 1960 Canadian Bill of Rights. *Department of Justice Act*, R.S.C. 1985, c. J-2, s.4; SOR/85-781.

7 This review process culminated in omnibus legislation, which amended a wide range of statutes.

8 This opinion is implied by David Kinley, *The European Convention on Human Rights: Compliance Without Incorporation* (Aldershot, UK: Dartmouth, 1993), pp. 103-05.

9 For a more developed argument, see Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen's University Press, 1996).

10 *R. v. Keegstra* [1990] 3 S.C.R. 697 at p. 743.

11 *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199.

12 *RJR-MacDonald Inc.* [1995] at p. 329.

13 In the majority's view it is "hard to imagine how the presence of a tobacco logo on a cigarette lighter...would increase consumption; yet, such use is banned." *RJR-MacDonald Inc.* [1995] at p. 342.

14 *RJR-MacDonald Inc.* [1995] at p. 329.

15 *RJR-MacDonald Inc.* [1995] at pp. 344-45.

16 *RJR-MacDonald Inc.* [1995] at pp. 310-11.

17 *RJR-MacDonald Inc.* [1995] at p. 312.

18 *Ford. v. Quebec (Attorney General)* [1998] 2 S.C.R. 712 at pp. 765-67.

19 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 968.

20 *Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313; *Government of Saskatchewan v. Retail Wholesale and Department Store Union, Locals 544, 496,635 & 955* [1987] 1 S.C.R. 460; *R. v. Public Service Alliance of Canada* [1987] 1 S.C.R. 424. Two reasons were given. One is that the Charter is not principally concerned with economic interests, which is how striking was characterized. Second, the Court indicated that if it upheld a right to strike it would subsequently be required to intervene in economic disputes between governments and their public sector unions, when deciding whether labour legislation is reasonable under section 1. This, in the Court's opinion, was a task for which it was ill-equipped based on judicial expertise and competence.

21 *Irwin Toy Ltd* [1989] at p. 970.

22 *R. v. Butler* [1992] 1 S.C.R. 452 at p. 505.

23 *R.v. Keegstra* at [1990] pp. 761-63.

24 *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232 at p. 247.

25 *RJR-MacDonald Inc.* [1995] at pp. 332-33.

26 *Tobacco Act* S.C. 1997, c. 13. The legislation prohibits sales of tobacco products to persons under 18 years of age; requires health messages on packages of tobacco products that are attributable to health authorities and detailed information about tobacco products and their emissions; prohibits the advertising of tobacco products, except product information and brand preference advertising in publications with primarily adult readership; prohibits the distribution and promotion of tobacco products if any of their brand elements appear on a non-tobacco product that is associated with youth or lifestyle; and restricts sponsorship promotions that contain tobacco brand elements to 10 percent of the displace surface and to those publications with primarily adult readerships or events or places where young persons are not permitted by law.

27 David Dingwall, House of Commons *Debates*, December 5, 1996, p. 7115.

28 Dingwall, House of Commons *Debates*.

29 Judy Ferguson, Director General, Health Policy and Information, *Proceedings of the House of Commons Standing Committee on Health*, December 6, 1996.

30 Robert Parker, Chair and Chief Executive Officer of the Canadian Tobacco Manufacturers' Council, *Proceedings of the Senate Committee on Legal and Constitutional Affairs*, April 3, 1997.

31 Rick Dearden, Legal Counsel, Molstar Sports Entertainment, *Proceedings of the Senate Committee on Legal and Constitutional Affairs*, April 3, 1997.

32 Two new judges are on the bench, replacing the late Justice Sopinka and the retired Justice La Forest who were on either side of the section 1 ruling. Justice Cory, who had concluded that the legislation was a reasonable limit on free speech, retires in June 1999.

33 *RJR-MacDonald* [1995] at p. 328.

34 Barrie McKenna, "Dingwall Softening on Tobacco Bill," *The Globe and Mail*, February 4, 1997, pp. A1-A2.

35 Laura Eggertson, "Tobacco Companies Fighting Back," *The Globe and Mail*, April 22, 1997, pp. A1-A2.

36 Maurice Vellacott, House of Commons *Debates*, December 5, 1997, p. 2805.

37 *An Act to Amend the Tobacco Act*, S.C. 1998, c. 38.

38 Information bulletin, Health Canada, June 1998.

39 Former health minister David Dingwall says the Cabinet discussed, but dismissed, his suggestion that the override be used following the *RJR-MacDonald* decision. He also suggests that while he expects the new legislation to pass judicial scrutiny, if it is nullified he thinks Parliament should use the override. Interview with author, Ottawa, April 17, 1999.

40 *R. v. Seaboyer* [1991] 2 S.C.R. 577; *R. v. O'Connor* [1995] 4 S.C.R. 411; R. v. Carosella [1997] 1 S.C.R. 80.

41 *R.v. Seaboyer* [1991] at p. 616.

42 *R. v. Seaboyer* [1991] at pp. 612-16.

43 She outlined judicial guidelines for determining when evidence of a woman's sexual past should be included at trial. *R.v. Seaboyer* [1991] at pp. 634-36.

44 *R.v. Seaboyer* [1991] at p. 707.

45 See for example Julian V. Roberts and Renate M. Mohr, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994).

46 *An Act to Amend the Criminal Code (Sexual Assault)* S.C. 1992, C. 38, s.2.

47 Consent is defined as voluntary agreement to engage in sexual activity and cannot be inferred as having been granted in a number of situations. For example, consent cannot be assumed to have been granted where the agreement was expressed by someone other than the complainant, where the complainant is incapable of consenting to the activity, or where the complainant had initially consented to engage in sexual activity but subsequently expressed a lack of agreement to continue to engage in sexual activity.

48 For discussion of groups' reaction to and comments on Bill C-49, see Janet Hiebert, "Debating Policy: The Effects of Rights Talk," in F. Leslie Seidle (ed.), *Equity & Community: The Charter, Interest Advocacy and Representation* (Montreal: The Institute for Research on Public Policy, 1993), pp. 41-56.

49 *R. v. Ewanchuk*, Supreme Court of Canada, February 25, 1999 (unreported at the time of writing).

50 *R. v. Ewanchuk*, at paras. 64-65, emphasis in original.

51 *R. v. Ewanchuk*, at para 89.

52 *R. v. Ewanchuk*, at para 95.

53 Susan Bazilli, Legal Director, Metro Action Committee on Public Violence Against Women and Children (METRAC) Minutes of Evidence, *Standing Committee on Justice and Legal Affairs*, March 11, 1997. One MP reported to Parliament that he had heard of a workshop for defence counsel, which provided tips when seeking medical, psychiatric, hospital and immigration records as part of a strategy "to whack the complainant hard at the preliminary inquiry" to encourage complainants to have the charges withdrawn to avoid a grueling and embarrassing treatment in court. Gordon Kirkby (Parliamentary Secretary to Minister of Justice and Attorney General of Canada, Liberal), House of Commons *Debates*, February 4, 1997, p. 7650.

54 *R.v. O'Connor* [1995] at p. 439.

55 *R.v. O'Connor* [1995] at pp. 439-41.

56 *R.v. O'Connor* [1995] at pp. 433-34.

57 *R.v. O'Connor* [1995] at p. 504.

58 *R.v. O'Connor* [1995] at p. 499.

59 *R.v. O'Connor* [1995] at p. 481.

60 *R.v. O'Connor* [1995] at pp. 482-84.

61 *R.v. O'Connor* [1995] at p. 488.

62 *R.v. O'Connor* [1995].

63 *R.v. O'Connor* [1995] [emphasis in original].

64 *R.v. O'Connor* [1995] at p. 489.

65 *R.v. O'Connor* [1995] at p. 491.

66 *R.v. O'Connor* [1995].

67 Margaret MacGee, Chair, National Council of Women of Canada, *Standing Committee on Justice and Legal Affairs* March 12, 1997.

68 K. Makin, "Court Rules Against Rape Victims," *The Globe and Mail* , December 15, 1995, p. A1.

69 As cited in Andrea Neufeld, "A.(L.L.) v. B.(A.): A Case Comment on the Production of Sexual Assault Counselling Records," *Saskatchewan Law Review*, Vol. 59, no. 2 (1995), p. 354.

70 Kane, *Standing Committee on Justice and Legal Affairs*, March 4, 1997.

71 Backgrounder, Press Release, "An Act to Amend the Criminal Code" (Production of Records in Sexual Offence Proceedings), Department of Justice, June 12, 1996.

72 These grounds are stipulated in section. 278.3(4).

73 *R.v. O'Connor* [1995] at pp. 433-34.

74 *R.v. O'Connor* [1995] at p. 442.

75 *R.v. O'Connor* [1995] at pp. 429-30.

76 Marvin Bloos, Chair, Canadian Council of Criminal Defence Lawyers, *Proceedings of the Standing Committee on Justice and Legal Affairs*, March 13, 1997.

77 Bruce Durno, President, Criminal Lawyers' Association, *Proceedings of the Standing Committee on Justice and Legal Affairs*, March 13, 1997.

78 Bloos, March 13, 1997.

79 Sheila MacIntyre, National Legal Committee, Women's Legal Education and Action Fund, *Proceedings of the Standing Committee on Justice and Legal Affairs*, March 6, 1997.

80 A proposed amendment to the legislation, which did not pass, would have required the accused to prove that access to confidential records was "probably essential" instead of "likely relevant," the term used in the bill.

81 *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835 at p. 877.

82 A number of witnesses argued that this would be beneficial to counteract these sexist myths and prejudices which are still clearly present in our judicial system. See for example, Regroupement québécois des centres d'aide et de lutte contre les agressions à caractère sexuel, the Ontario action group to combat violence against women, LEAF, and METRAC.

83 Jennifer Scott, Director of Litigation, Women's Legal Education and Action Fund, *Proceedings of the Standing Committee on Justice and Legal Affairs*, March 6, 1997.

84 Irwin Koziebrocki, Treasurer, Criminal Lawyers' Association, *Proceedings of the Standing Committee on Justice and Legal Affairs*, March 13, 1997.

85 Durno, *Proceedings of the Standing Committee on Justice and Legal Affairs*, March 13, 1997.

86 *R. v. Carosella* [1997] 1 S.C. R. 80.

87 *R. v. Carosella* [1997] at p. 107.

88 *R. v. Carosella* [1997] at pp. 113-14.

89 *R. v. Carosella* [1997] at p. 114.

90 *R. v. Carosella* [1997] at pp. 120-22, 137-38.

91 *R. v. Carosella* [1997] at pp. 142, 146-47.

92 *An Act to Amend the Criminal Code (Production of Records in Sexual Assault Proceedings)*, S.C. 1997, c. 30.

93 For contrary views see *R. v. Mills*, [1997] A.J. No. 1036, Alberta Court of Queen's Bench, Judicial District of Edmonton Belzil J, October 31, 1997 and *R. v. Curti* [1997] B.C.J. No. 2367 Hutchison J.

94 One trial judge argued that it would be contrary to a free and democratic society to conclude that the legislation is not reasonable because Parliament prefers the reasons of four justices of the Supreme Court of Canada over the reasons of the other five. *R. v. Curti* [1997] B.C.J. No. 2367 Hutchison J.

95 "A Hybrid Approach to Rights Protection: An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny," *Federal Law Review*, Vol. 26, no. 1 (1998); "Legislative Scrutiny: An Alternative Approach for Rights Protection," in Joseph Fletcher (ed.), *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, forthcoming 1999).

96 Peter H. Russell, "Reform's Judicial Agenda," *Policy Options*, Vol. 20, no. 2 (April 1999), p. 13.

97 E. Preston Manning, "A "B" for Prof. Russell," *Policy Options*, Vol. 20, no. 2 (April 1999), p. 15.

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# Summary


**Wrestling with Rights: Judges, Parliament and the Making of Social Policy**

Janet L. Hiebert

Most observers assume that the principal effect of the Canadian Charter of Rights and Freedoms has been on Canada's courts. But what should not be overlooked is how a judicially reviewable bill of rights affects governing. The Charter has constrained and influenced legislative choices at all stages of policy development.

The Charter's effects on governing and political responsibility have given rise to two different expectations. According to these, the Charter will either i) provide convenient refuge for politicians to avoid or delay difficult political and moral decisions or ii) facilitate institutional dialogue between courts and Parliament on the reasonableness and justification of state actions. The paper examines three issues: restrictions on tobacco advertising, the definition of consent in sexual assault trials, and access to private records in sexual assault trials. These case studies suggest that neither view explains fully the Charter's effects on governing.

Nevertheless, from the perspective of a democratic ideal, it would be desirable if Parliament and the judiciary were to treat the Charter as the locus for inter-institutional discussions about the justification of state actions. Accumulated jurisprudence provides a context for Parliament to assess legislation and ask itself whether legislative objectives are consistent with the values of the Charter or whether its choice of legislative means are reasonable. Courts can also benefit from being better apprised of the policy concerns that have animated legislation and the reasons why particular legislative means have been chosen over others.

However, if this ideal of parliamentary/judicial dialogue is to be attained, Parliament must become a more informed and serious partner in Charter debate. Charter appraisal occurs within the executive and is performed by lawyers with the Department of Justice. But Parliament itself does not currently play a systematic role in assessing the Charter implications of proposed legislation. Thus, the notion of parliamentary/judicial dialogue around the Charter is, at present, not particularly meaningful. The paper recommends a way to improve the quality of parliamentary discussions: the establishment of a parliamentary Charter committee to scrutinize proposed legislation from a rights perspective.

The role of a Charter committee would be to provide a foundation for Parliament's collective and principled judgement about whether legislation is responsible in light of the Charter and consistent with the values of a free and democratic society. By identifying serious Charter concerns and facilitating a more rigorous and conscious evaluation of legislation, greater pressure will be placed on government to explain, justify and, where warranted, amend or even withdraw legislation. This more systematic and rigorous scrutiny would provide a more transparent and accountable record of political debate, a desirable democratic objective in itself. However, judges would also benefit from a more full and transparent public record of debate that focuses directly on Charter issues, the considerations that have influenced legislative decisions, and the policy arguments about justification. The concept that Parliament and courts share responsibility for interpreting the Charter does not presume that judges are the only institutional actors whose voices are authoritative and legitimate when interpreting and resolving conflicts around rights. It also does not presume that there will always be institutional agreements on how to reconcile conflicting rights and values. Nevertheless, from more careful parliamentary scrutiny will come more reasonable legislation. From a more conscious and transparent parliamentary Charter debate, the reasonableness of legislative decisions will also become more apparent. For both reasons, courts may have less cause to set aside legislation.